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FILE: Legal

MEMORANDUM FOR: General Counsel

FROM: Harry E. Fitzwater
Deputy Director for AdministrationSUBJECT: Proposed Transfer of Freedom of Information Act and Privacy
Act Appeals Processing to the Office of Information Services

Stan:

1. I believe the responsibility for the preparation of responses to appeals under the Freedom of Information Act (FOIA) and the Privacy Act (PA) should be transferred to the Information and Privacy Division (IPD), Office of Information Services, DDA. IPD has overall responsibility for the coordination and processing of all requests under the two Acts as well as requests under Executive Order 12065. A transfer of the appeal responsibility would speed up the process and eliminate much of the appeals backlog without any diminution in the quality of the process.

2. The appeals process is basically an administrative one, not a legal one. Under current procedures, IPD handles all processing of administrative appeals except to write the final response letters, which are done by OGC paralegals under the guidance of attorneys. The original decision to place responsibility with OGC for appeals was based more on default than logic. At the time, OGC had the resources, others did not. It was also felt at the time that OGC should have input and control over cases at the appeals level since the next possible step in any particular case would be litigation. While this is a valid concern, the law does not mandate oversight by an attorney. In addition, IPD now has sufficient experience to be able to do the job with the same degree of quality that OGC paralegals and attorneys now contribute. A number of other agencies handle appeals as an administrative process and I believe CIA should also.

3. The Agency currently has a backlog of nearly 300 cases awaiting actions under the administrative appeal provisions of the FOIA and PA. One case has been outstanding as far back as 1975. OGC seems to have a disproportionate share of these backlogged cases with about 140 appeal cases awaiting action. An analysis of this number reveals that four cases were assigned to OGC for action in 1976, eight cases in 1977, ten in 1978, 12 in 1979, 46 in 1980, and 60 in 1981.

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4. The major contributing cause for the backlog in OGC seems to be directly related to the number of civil actions filed against the Agency over the years. Litigation necessarily receives priority attention of OGC attorneys over appeals and no one could logically argue to the contrary. However, this has caused the backlog of appeal cases in OGC. In recognition of this dilemma, in 1977 OGC was authorized to hire several paralegals to handle the processing of administrative appeals. However, the increased burdens and the priority of litigation caused the paralegals, for the most part, to be recruited to work on litigation cases.

5. As to the future, there is no reason to believe that the number of actions filed against the Agency will decrease. Rather, it seems certain they will increase. The outcome for the processing of appeals is predictable--a sustained high level of cases requiring OGC action. Certainly, OGC ought to provide legal guidance during the appeal phase. But, I do not believe the whole process should be slowed because of other priority interests. If OGC is concerned that legal issues might not receive proper attention if the appeal process were entirely under IPD, then you might consider the full time assignment of one attorney to supervise the appeal process and this would be welcomed. This attorney could also act as advisor for all matters related to the two Acts, resulting in the additional benefit of providing greater consistency in legal decisions on matters related to the FOIA and PA.

6. In summary, a transfer of the administrative appeals responsibility to IPD would have a positive impact on the processing of these cases, leading to a reduction in the backlog. OGC would be able to concentrate its attention and specialize on priority litigations without having to siphon off resources for administrative appeals. IPD, through consultations with OGC or through direct assignment of an attorney to IPD, would be able to maximize its specialty of coordination and information handling. This transfer would permit more effective utilization of resources and reduce the lag the Agency experiences in handling appeals, thus reducing or eliminating the number of law suits which are brought against the Agency for non-response within statutory time limits. Clearly, it is in the Agency's interest to handle the appeal cases as expeditiously as possible. I believe this can be achieved without a concomitant loss in quality. I would welcome the opportunity to discuss these issues with you.

Harry

Harry E. Fitzwater

DIS:THWhite:ydc (22 May 81)

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